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On this ground, several cases have denied women the right to hold office.²²

It is consequently noteworthy that the Supreme Court of Nebraska, a state which does not give women the ballot,²³ has recently decided that a woman elected to the office of county treasurer may get from the rival male candidate the property pertaining to the office. *State ex rel. Jordan v. Quible*, 86 Neb. 417.²⁴ This is well-nigh the most important elective position which a woman has been sanctioned in holding, and, as a dissenting judge observes,²⁵ the decision makes it possible for a woman to be even governor.

THE REFERENDUM AS A "REPUBLICAN FORM OF GOVERNMENT." — The referendum has frequently been attacked as a delegation of legislative power and hence contrary to the state constitutions, which vest that power in the legislature.¹ Notwithstanding this argument, a general statute to take effect only if approved by a majority of the voters was upheld in a recent Wisconsin case. *State ex rel. Van Alstine v. Frear*, 142 Wis. 320.²

In view of the comparative ease with which state constitutions are amended, the relation to them of direct legislation is not of such great practical importance as its validity under the Constitution of the United States. An objection to the referendum, especially when coupled with the initiative, which has frequently been suggested,³ but is not discussed in the principal case, is that direct legislation violates the clause of the federal Constitution which guarantees to each state a republican form of government.⁴ The contention is that a republic is a representative democracy as distinguished from a direct or pure democracy. Hence it becomes important to determine the true meaning of the word.

The Latin *res publica*, at least as late as the sixteenth century, was altogether colorless as to the form of government it designated.⁵ The compound adjective is not found in classical or mediæval Latin.⁶ The noun "republic" and the adjective "republican" were used by Wilson,⁷

²² See *Atty.-Gen. v. Abbott*, *supra*; *Atchison v. Lucas*, *supra*. But see *State v. Hostetter*, *supra*; *Wright v. Noell*, *supra*. It has been said that conferring suffrage on women makes them eligible for office. See *State v. Cones*, 15 Neb. 444. Cf. *Olive v. Ingram*, 2 Strange 1114. But in England it has been held that a woman is not eligible even for an office for which she can vote. *Beresford-Hope v. Lady Sandhurst*, *supra*.

²³ But see *State v. Cones*, *supra*.

²⁴ The decision went on the ground that this is the common law. The constitution formerly restricted office-holding to voters. Neb. Const. (1866) Art. III, sec. 4. And members of the legislature are expressly required to be electors. Neb. Const. (1875) Art. III, sec. 5. But the court did not comment on these points.

²⁵ See 86 Neb. 417, 420.

¹ For a discussion of this phase of the problem, see 7 HARV. L. REV. 485; 16 *ibid.* 218.

² For a discussion of another point in the same case see 24 HARV. L. REV. 50.

³ See McCLAIN, CONSTITUTIONAL LAW, 10; 56 CENT. L. J. 247. But see *Southwestern Telegraph & Telephone Co. v. City of Dallas*, 131 S. W. 80 (Tex.).

⁴ U. S. CONST. art. 4, § 4.

⁵ See CALVIN, INSTITUTIONUM CHRISTIANAE RELIGIONIS, lib. 4, cap. 20.

⁶ It does not appear in DU CANGE, GLOSSARIUM.

⁷ See *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, 457.

the author of the clause in its final form,⁸ and by other publicists⁹ of the time in a sense broad enough to include direct democracy. The same thing is true of the use of the corresponding French words *république* and *républicain* by Montesquieu¹⁰ and apparently by Rousseau,¹¹ the writings of both of whom had a great influence on American political thought of that period. The political party which advocated keeping the government as close to the people as possible was called, shortly after the formation of the Constitution, the Republican Party.¹² On the other hand, Madison defines a republic as "a government in which the scheme of representation takes place," and contrasts it with a pure democracy.¹³ Discussion of the clause under consideration in the constitutional convention indicates that it was directed against insurrection, invasion, and monarchical forms.¹⁴

The state governments in existence in 1787 must be taken as examples of the republican form, in the sense in which that phrase is used in the Constitution.¹⁵ In spite of the fact that the referendum appears in the formation of some of the state constitutions¹⁶ and in spite of the existence of the New England town government,¹⁷ so close a student of political science as Hamilton believed that the state governments were then wholly representative.¹⁸ Another of the authors of the Federalist, however, points out that the Constitution does not forbid the substitution of other republican forms for those then existing.¹⁹ It seems, on the whole, that "republican" in the Constitution is ambiguous, and that a positive construction that it had a meaning so narrow as to exclude direct legislation cannot be supported.

But even if "Republican Form of Government" does mean representative government, it might well be contended that a slight tincture of direct democracy would not destroy the representative character of a state government.²⁰ Furthermore, it is probable that the enforcement of the constitutional guaranty is a political question for Congress and the President rather than for the judiciary.²¹

THE CUSTODY OF CHILDREN AND CONFLICT OF LAWS. — The commendable tendency to make the welfare of the children the primary consideration in questions concerning their custody has caused considerable

⁸ See 2 GILPIN, MADISON PAPERS, 1141.

⁹ See 1 MADISON, LETTERS AND OTHER WRITINGS, 350; 4 *ibid.* 467; 10 FORD, WRITINGS OF THOMAS JEFFERSON, 28.

¹⁰ See L'ESPRIT DES LOIS, liv. 2, ch. 1, 2.

¹¹ See CONTRAT SOCIAL, liv. 3, ch. 4.

¹² See HART, FORMATION OF THE UNION, 155, 164.

¹³ See THE FEDERALIST, No. 10.

¹⁴ See 2 GILPIN, MADISON PAPERS, 1130-1141.

¹⁵ See *Minor v. Happersett*, 21 Wall. (U. S.) 162.

¹⁶ See LOBINGIER, THE PEOPLE'S LAW, 163-187.

¹⁷ For an argument from this that the guaranty has no application to local government, see *Eckerson v. Des Moines*, 137 Ia. 452.

¹⁸ See THE FEDERALIST, No. 63.

¹⁹ See *ibid.* No. 43, § 6 (Madison).

²⁰ See *State v. Pacific States Telephone & Telegraph Co.*, 53 Ore. 162; *Kaddery v. City of Portland*, 44 Ore. 118.

²¹ See *Taylor v. Beckham*, 178 U. S. 548, 578; *Luther v. Borden*, 7 How. (U. S.) 1, 42.